

EXHIBIT A
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan van Keulen, Magistrate Judge

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER CASTILLO
and MONIQUE TRUJILLO, individually
and on behalf of all others
similarly situated,

Plaintiffs,

VS.

GOOGLE LLC and ALPHABET INC.,

Defendant.

PATRICK CALHOUN, ELAINE CRESPO,
HADIYAH JACKSON, CLAUDIA KINDLER,
LEROY RANDOLPH, DR. CORINICE
WILSON, DR. RODNEY JOHNSON,
MICHAEL HENRY, and JOSE MARIA DE
GUZMAN, on behalf of themselves
and all others similarly situated,

Plaintiffs,

VS.

GOOGLE LLC,

Defendant.

ORIGINAL

NO. C 20-03664 LHK (SVK)

*** SEALED BY ORDER ***
OF THE COURT

NO. C 20-05146 LHK (SVK)

San Jose, California
Thursday
September 30, 2021

TRANSCRIPT OF OFFICIAL ELECTRONIC SOUND RECORDING

OF REMOTE ZOOM VIDEO CONFERENCE PROCEEDINGS

TIME: 9:36 A.M. - 11:39 A.M. = 2 HOURS, 3 MINUTES

(APPEARANCES ON FOLLOWING PAGE)

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CSR No. 7445, Official U.S. Reporter

ORIGINAL

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Also Present:

**Douglas A. Brush, Special Master
Tim Schmidt**

UNDER SEAL BY ORDER OF THE COURT

1 Thursday - September 30, 2021

9:36 a.m.

2 P R O C E E D I N G S

3 ---o0o---

4 (Proceedings under seal by order of the court.)

5 **THE CLERK:** Please come to order. The Honorable
6 Susan van Keulen presiding.

7 **THE COURT:** Good morning. Good morning, everyone.
8 Thank you for navigating the Zoom landscape this morning. Once
9 again, Ms. Fanthorpe had to go unlock a back door for me to
10 actually appear. I think Thursday mornings are very heavy
11 traffic in the Court for Zoom. So we'll just -- we'll just
12 blame the -- put it on -- on traffic load.

13 Okay. Thank you all for being here. And all of you were
14 on time. Thank you.

15 And, Ms. Fanthorpe, if you'll call the cases, we'll get
16 under way.

17 **THE CLERK:** Yes. Calling Case 20-cv-3664, Brown, et al.
18 versus Google LLC, et al., and Case 20-cv-5146, Calhoun, et al.
19 versus Google LLC.

20 These hearings are being recorded this morning via Zoom,
21 and this is a sealed hearing.

22 Counsel, please identify yourselves for the record,
23 beginning with plaintiff.

24 **THE COURT:** And I'll tell you what. To streamline the
25 process a little bit, we'll take the Brown plaintiffs and then

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1 the Calhoun plaintiff appearances and then the Google
2 appearances at one time for both cases, and then I'll take the
3 appearance of the Special Master.

4 So let's start with Brown plaintiffs, please.

5 **MS. BONN:** Good morning, Your Honor. Amanda Bonn with
6 Susman Godfrey on behalf of the Brown plaintiffs. And also on
7 the line from Susman Godfrey is my colleague Alex Frawley.

8 **MR. FRAWLEY:** Good morning, Your Honor.

9 **MS. BONN:** And I'll allow our co-counsel to introduce
10 themselves.

11 **THE COURT:** Good morning.

12 And, actually, since the screen is quite full at the
13 moment, as it should be for appearances, if you all would raise
14 your hand about camera level when you start to speak. I do
15 prefer the gallery view to the speaker view because I like to
16 keep an eye on everybody. So that'll help me find you quickly.

17 **MR. MAO:** Good morning, Your Honor. This is Mark Mao of
18 Boies Schiller Flexner. And also on the screen is my colleague
19 Beko Richardson. We are here on behalf of the Brown
20 plaintiffs. Good morning, Your Honor.

21 **THE COURT:** Thank you. Good morning.

22 Good morning, Mr. Richardson.

23 **MR. MCGEE:** And good morning, Judge. Ryan McGee with the
24 law firm of Morgan & Morgan, also on behalf of the plaintiffs.

25 **THE COURT:** Mr. McGee, good morning.

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1 All right. Anyone else for Brown plaintiffs this morning?

2 (No response.)

3 **THE COURT:** All right. Excellent.

4 Let's turn to Calhoun, please.

5 **MR. STRAITE:** Good morning, Your Honor. This is
6 David Straite from DiCello Levitt in New York for the Calhoun
7 plaintiffs. Also joining me from DiCello Levitt from our
8 Chicago office is Adam Prom.

9 **THE COURT:** Mr. Prom.

10 **MR. STRAITE:** And then we also have colleagues.
11 Jay, why don't you go next.

12 **MR. BARNES:** Sure.

13 Thank you, Your Honor. Jay Barnes from Simmons Hanly
14 Conroy on behalf of the plaintiffs.

15 **THE COURT:** Good morning, Mr. Barnes.

16 **MS. WEAVER:** And good morning, Your Honor. Lesley Weaver
17 from Bleichmar Fonti. And with me I have Angelica Ornelas,
18 also from my firm, on behalf of Calhoun.

19 **THE COURT:** Ms. Ornelas, good morning.

20 Ms. Weaver, thank you.

21 Anyone else for the Calhoun plaintiffs this morning?

22 **MR. STRAITE:** No, Your Honor. That should be it.

23 **THE COURT:** Excellent.

24 All right. And for Google in both cases, appearances
25 today, please.

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1 **MR. SCHAPIRO:** Good morning, Your Honor. I'm Andrew
2 Schapiro. And I'm joined by a number of colleagues so that we
3 can cover whatever you want to cover with each of these cases.
4 I'll ask them each to wave.

5 Stephen Broome.

6 **THE COURT:** Mr. Broome, good morning.

7 **MR. SCHAPIRO:** Sara Jenkins, who I don't believe you've
8 met yet, but who's been doing all the most important work in
9 this case, really.

10 **THE COURT:** Outstanding.

11 Ms. Jenkins, welcome.

12 **MR. SCHAPIRO:** Teuta Fani.

13 **THE COURT:** Ms. Fani, good morning.

14 **MR. SCHAPIRO:** Jomaire Crawford.

15 **THE COURT:** Ms. Crawford.

16 **MR. SCHAPIRO:** And then some familiar faces to you.
17 Jonathan Tse.

18 **THE COURT:** Mr. Tse, good morning.

19 **MR. SCHAPIRO:** Josef Ansorge.

20 **THE COURT:** Mr. Ansorge.

21 **MR. SCHAPIRO:** And Viola Trebicka.

22 **THE COURT:** Ms. Trebicka, good morning.

23 All right. Thank you all very much.

24 And I did ask the Special Master to join us today.

25 Mr. Brush, if you'll introduce yourself for the record,

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1 please.

2 **SPECIAL MASTER BRUSH:** Hi. This is Douglas Brush. And
3 joining with me today is Tim Schmidt, representing the Special
4 Counsel Team.

5 **THE COURT:** Excellent.

6 **SPECIAL MASTER BRUSH:** The Special Master Team. Sorry.

7 **THE COURT:** Special Master. That's all right. We got it.

8 And I know you are well known to everyone on this call, as
9 I do get regular updates from the Special Master and I do take
10 advantage of his technical expertise as needed.

11 So thank you for being here, Special Master Brush and
12 Mr. Schmidt.

13 All right, then. I want to start with the proposed orders
14 regarding discovery limitations.

15 I have a proposed order from Google in both Brown and
16 Calhoun. It is not clear to me how much, if any, meet and
17 confer has taken place on these orders in their entirety. I
18 know there are a few issues that have been discussed by the
19 parties. And I note that the orders are -- are different.
20 They are tailored to the respective classes.

21 My thought would be to -- I'd like to hear briefly from
22 the parties on the status of the -- of a discussion, if there
23 has been any, on discovery limitations. And then we'll set a
24 short timeline to complete meet and confer and for you to get a
25 proposed order to me.

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1 And I'll just, again, remind folks. I know that Google
2 proposed limitations a couple of months ago, which I
3 acknowledged there would be an appropriate time in the future,
4 but it was not yet at that time.

5 We're now, for all intents and purposes, at the start of
6 October; and there are three months and three weeks, roughly,
7 left on the -- in discovery. So I think now is a good time
8 indeed.

9 So with that said, let's start in Brown.

10 And, Mr. Schapiro, I don't know who has the mic from
11 Google on this issue. I just want a brief update as to what
12 discussions, if any, have there been with Brown around these
13 issues; and then I'll hear from someone on the Brown side; and
14 then we'll do the same thing on Calhoun.

15 If you're not addressing the discovery -- proposed
16 discovery orders today, I will ask you to turn off your video,
17 just because that will help me. You're welcome to come back or
18 pop in if your subject comes up. But, again, that just helps
19 me to be sure I'm organized and looking at and speaking with
20 the right folks.

21 So with that said, Mr. Schapiro, who has the mic --

22 **MR. SCHAPIRO:** Yes.

23 **THE COURT:** -- on this for Google?

24 **MR. SCHAPIRO:** So, Your Honor, Ms. Jenkins will primarily
25 address this.

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1 I just wanted to provide two or three sentences of
2 context.

3 **THE COURT:** Okay.

4 **MR. SCHAPIRO:** So you'll recall at the last hearing I
5 pleaded with you towards the end for an extra week. You were
6 going to have us -- you were going to set a deadline of
7 September 30th, today, and I said even an extra week would
8 help.

9 And I'm pleased to say we're going to meet that deadline,
10 but I wanted to just give you two sentences on what that
11 entailed to frame our discussions as we go forward so that we
12 don't lose sight of proportionality here.

13 **THE COURT:** Okay. Okay. Well, we're going to get to the
14 status of the production and the work in front of
15 Special Master Brush, which is largely, I think, what drives
16 the October 6 deadline. And this is really just a: What's the
17 status on these proposals?

18 **MR. SCHAPIRO:** Then I will hand off to Ms. Jenkins and
19 I'll save my speech.

20 **THE COURT:** The two sentences.

21 **MR. SCHAPIRO:** Yeah. It's a two-sentence speech.

22 **THE COURT:** You can save the two sentences.

23 Ms. Jenkins, welcome.

24 **MS. JENKINS:** Thanks.

25 **THE COURT:** Bring me up to date for Google, please.

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1 **MS. JENKINS:** Thank you. Good morning, Your Honor.

2 Yes. We did meet and confer last week with the Brown
3 plaintiffs about the -- the elements of the proposed order. We
4 believe that there is some room here for agreement on some of
5 these issues, and the plaintiffs acknowledge that there --
6 there may be areas with which they would agree, and potentially
7 some additional meet and confer might be helpful to that point.

8 There are -- there are a few points in our proposed order
9 that plaintiffs have said that they do not agree with. And
10 would you like me to go through the elements?

11 **THE COURT:** No. I'll let them just say what they think
12 the big issues are.

13 What areas do you think -- or are you aware of any issues
14 of agreement at this time or that you are hopeful or expect the
15 parties to reach agreement?

16 **MS. JENKINS:** I believe the parties can reach agre- --
17 meet agreement on the issue of any additional requests for
18 production of documents; that the parties seem to be in
19 agreement that they could meet and confer to discuss whether
20 there should be any additional requests for production of
21 documents should the plaintiffs decide that they need some and
22 then come to the Court if there is a disagreement about whether
23 they are needed.

24 And that -- the same status with respect to search terms.
25 I believe we are in agreement that the parties can discuss if

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1 the plaintiffs believe that they need any additional search
2 terms, which they've expressed to us that they do not currently
3 foresee that but, if it should become necessary based on review
4 of the current documents, that we could meet and confer with
5 them and, if there are any issues, if there's an impasse, that
6 we could ask for your guidance on that.

7 **THE COURT:** Okay. That's very helpful.

8 Ms. Jenkins, one final question. Is there any additional
9 meet and confer already scheduled at this time on this issue?

10 **MS. JENKINS:** There is not. But, I mean, we're prepared
11 to do it, and I can be available today or tomorrow, whenever
12 plaintiffs are available.

13 **THE COURT:** All right. Thank you, Ms. Jenkins.

14 All right. And for the Brown plaintiffs, Mr. Richardson,
15 is that you?

16 **MR. RICHARDSON:** Yes, Your Honor. Good morning.

17 **THE COURT:** Good morning.

18 **MR. RICHARDSON:** How Ms. Jenkins described it is correct.
19 I think there's -- there's room to negotiate here.

20 This was sent to us just before the filing. We quickly
21 scheduled a meet and confer. We told them then that we think
22 we can -- we can talk about some of these issues, especially
23 service of additional discovery and search terms.

24 You'll also notice there are a few points here that
25 overlap with our other disputes.

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1 **THE COURT:** Mm-hmm.

2 **MR. RICHARDSON:** So, for example, the first one, we have a
3 dispute on counting interrogatories, which is obviously
4 relevant to what the cap should be on the number of
5 interrogatories.

6 We have a dispute regarding privilege issues. That's the
7 last bullet point.

8 **THE COURT:** Mm-hmm.

9 **MR. RICHARDSON:** And the deadline for producing additional
10 privilege logs and how to handle those issues. And Ms. Bonn
11 will -- will address those separately.

12 But I just wanted to flag, there's a few points in here
13 where we very clearly have a dispute, but then there's a couple
14 points where I think we can certainly make progress. We're
15 also happy to meet and confer later today or tomorrow.

16 **THE COURT:** Okay. So you identified the privilege log
17 issue -- and I know that's wrapped up in today's agenda -- and
18 the "how do you count interrogatory" issue.

19 And was there something else that you had clearly as a
20 dispute?

21 **MR. RICHARDSON:** Yes. Let me add two more. One is the
22 production of earlier-in-time e-mails.

23 **THE COURT:** Okay.

24 **MR. RICHARDSON:** We had an --

25 **THE COURT:** You're not closing any doors. Let me just be

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1 clear. By not identifying a dispute doesn't mean that I'm
2 assuming --

3 **MR. RICHARDSON:** Yes.

4 **THE COURT:** -- there's agreement.

5 I just want to know where the -- where you at this moment
6 perceive the real sticking points.

7 **MR. RICHARDSON:** So I think it would be the first bullet,
8 the limit on interrogatories; the second bullet, the limit on
9 RFAs.

10 **THE COURT:** Mm-hmm.

11 **MR. RICHARDSON:** The fourth bullet, the last-in-time
12 e-mails; and then the last two bullets in terms of privilege
13 issues.

14 But in terms of additional discovery and search terms, I'm
15 sure we can work that out.

16 **THE COURT:** Okay. Good. I'm glad to hear that.
17 All right. That's very helpful. Thank you, both.

18 Let me hear, similarly, in the Calhoun case, and then
19 we'll come back to next steps.

20 So who has -- well, let me start with you, Ms. Jenkins.
21 And just again in the same form, where have you been on meet
22 and confer and -- if anywhere, and areas where you're hopeful
23 for agreement?

24 **MS. JENKINS:** So, Your Honor, my understanding is we've
25 not met and conferred specifically on the protective order, but

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1 we have met and conferred on some of the issues that are
2 rep- -- not the protective order. Sorry. The --

3 THE COURT: I know.

4 MS. JENKINS: -- proposed order.

5 THE COURT: I know what you mean.

6 MS. JENKINS: But we have -- we have met and conferred
7 regarding some of these issues, specifically requesting that
8 the plaintiffs agree to some limitations on discovery. And we
9 understand that there is -- has been no willingness of the
10 plaintiffs to agree to that.

11 We've asked them to agree to -- to the production of only
12 the last-in-time e-mails; and they've said -- they've also said
13 they would not agree to that.

14 They've indicated that despite the fact that since your
15 last -- since July, they've had a huge influx of discovery
16 requests on us and the majority of those coming after the
17 August 12th hearing wherein you set the October 6th deadline --

18 THE COURT: Right.

19 MS. JENKINS: -- that they still intend to propound more
20 discovery requests, including --

21 THE COURT: I -- I --

22 MS. JENKINS: -- document requests.

23 THE COURT: I do understand the problem. I do.

24 MS. JENKINS: Okay.

25 THE COURT: I mean, I got that from the briefing. I just

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1 really wanted to --

2 MS. JENKINS: Sorry.

3 THE COURT: -- understand.

4 That's all right. That's all right.

5 MS. JENKINS: Thank you, Your Honor.

6 THE COURT: But I think you answered my question, which
7 is, the parties haven't really discussed, and we'll just take
8 it as all in dispute from your side at the moment.

9 But perhaps Mr. Straite has better news for the Court with
10 regards to Calhoun.

11 Parties' position on discovery limitation proposed order?

12 MR. STRAITE: Thank you, Your Honor. Yes, David Straite
13 for Calhoun plaintiffs.

14 I would describe this as better news. I would -- I would
15 agree with Ms. Jenkins that we have not had a specific
16 conversation about the proposed order that they attached to the
17 chart. However, there has been a lot of discussion, a lot of
18 meet and confer about how you would approach Google's request
19 for sequencing and limitations of discovery that they would
20 like between now and the end of fact discovery in January.

21 We have a different posture in Calhoun, only because we
22 have a class certification deadline in 15 days.

23 THE COURT: Mm-hmm.

24 MR. STRAITE: If that reality -- as soon as Google
25 approached us about the limitations that they're proposing in

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1 their order, our response was to ask if we could sequence
2 discovery and prioritize discovery that would be useful for
3 class certification. It was our understanding that Google
4 agreed that that was the smart approach. So that's how we've
5 been proceeding in response to Google's request.

6 So, for example, we've had multiple meet and confers,
7 including just yesterday, with Joey -- with Mr. Ansorge
8 regarding some discovery issues. We've also propounded
9 additional RFAs and other RFPs and interrogatories that are
10 focused on certain class certification issues.

11 There are two additional issues that we believe need to be
12 prioritized in light of the upcoming class certification
13 deadline. They're fairly critical, and they really do inform
14 how we could proceed with Google's request for their proposed
15 limitation order.

16 Number one is -- obviously, it's under control right now.
17 This is Dispute Number 1.3, plaintiffs' --

18 **THE COURT:** Okay. Wait, wait, wait. You're getting --
19 you're moving away from the proposed discovery order.

20 I understand you've got issues tied on the class
21 certification issue.

22 **MR. STRAITE:** Right.

23 **THE COURT:** My question -- go ahead.

24 **MR. STRAITE:** So the two class certification issues that
25 are most critical to resolve in order to understand Google's

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1 request, one is Dispute 1.3. Because it implicates plaintiff
2 data that we believe would be useful to inform the class
3 certification process, that's the number-one priority, is
4 getting the plaintiff data dispute with Special Master Brush
5 resolved in advance of class certification.

6 And then, number two, we've identified a new dispute,
7 Number 1.15. 1.15 is the most critical dispute. Those would
8 hold up further discussions about Google's proposal in their
9 limitation order.

10 **THE COURT:** Okay. Well, I expect both of those to be --
11 well, 1.13 is what you're working on with Special Master Brush.
12 So that is before him.

13 And 1.13 -- maybe I have those numbers backwards. But,
14 yeah, I recognize the issue that Calhoun identified. Okay.

15 **MR. STRAITE:** 1.15 is the (inaudible) --

16 **THE COURT:** 1.15. Is that it? Yeah. Okay.

17 **MR. STRAITE:** Okay.

18 **THE COURT:** All right, then. Thank you all for that.

19 What you will do is, obviously, we have a few issues to
20 address today, which I expect I will -- you know, I will hear
21 and then issue a ruling, if not today, tomorrow. And that may
22 then inform how the parties proceed on this.

23 So I want the parties then to meet and confer and -- on
24 discovery limits and submit a proposed order. If you -- the
25 areas where you can't agree, I actually prefer it as a -- as a

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1 single joint submission with the positions interleaved. Please
2 number the bullets. Let's not -- because it's easier to refer
3 to them that way, you know, 1 through 15, or whatever they are.
4 And then it can be Google's position followed by the
5 plaintiffs' position in a different color font so I can easily
6 see what the differences are.

7 I'll have you submit that to the Court by next Friday, the
8 8th. I'm not available next week. So I won't get to it any
9 sooner. But I will endeavor to turn to it when I am back
10 the week of the 11th. So I want to be sure I have that in
11 hand. All right?

12 **MR. STRAITE:** For that submission, would it be useful to
13 have it ordered to be done by close of business so that we can
14 respect the lives of our associates?

15 **THE COURT:** Actually, on the 8th, I'd like to get it by
16 noon. That's --

17 **MR. STRAITE:** Thank you, Your Honor.

18 **THE COURT:** -- often what I do, because then I know I have
19 a chance to get it.

20 And as is sometimes helpful in this case, I actually print
21 the papers because it's just easier to manage them in hard
22 copy.

23 The discovery charts are a definite exception to that
24 comment, of course.

25 All right. So discovery orders to the Court. A joint

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1 submission.

2 I would certainly welcome the parties' agreement, but let
3 me remind the parties of an obligation to this Court to engage
4 in robust -- and not just good faith, but robust meet and
5 confer. And if you are not able or comfortable at this time to
6 do that in person, that's fine; but then it's going to be by
7 video or by phone. This -- you can certainly follow up by
8 e-mail, but this is not an e-mail discussion. This is a
9 sleeves rolled up, here's what we need, and there will need to
10 be compromise on all sides.

11 There will be limits on discovery. And I appreciate that
12 discovery has been staged with a focus on class certification.
13 However, given the depth and scope and efforts of the parties
14 before the Special Master and the work of the Special Master on
15 database/logs production issues, given the work by this Court
16 and the parties on the ESI issues, I find -- it strikes me that
17 hundreds of RFPs is just -- is not -- not a thoughtful process.
18 So everybody needs to keep that in mind.

19 Similarly, I know that we are at this stage because it
20 took a long time for Google to get up and producing and making
21 meaningful productions, certainly in terms of numbers of
22 documents produced.

23 So both sides need to take a very hard, close look at what
24 they need, at the calendar, and demonstrate some -- some
25 compromise. Obviously, we are guided by Rule 26. This is

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1 discovery. It is going to happen. It will be -- it will be
2 proportional to the needs of the case. It will be also --
3 discovery is naturally an iterative process. It is not
4 necessarily always linear. But we will be moving forward and
5 narrowing. So everyone keep that in mind as you meet and
6 confer through this effort.

7 Okay. That addresses the discovery orders.

8 Let's turn briefly, then -- not "briefly," but let's turn
9 in Brown to the issue -- let's see. Let's go to the privilege
10 issue that has been raised in Brown. I think that is P-19 from
11 the plaintiffs' side and D-7 from Google's side, if I'm
12 remembering that correctly. They appear more or less to be the
13 flip sides of each other.

14 And I take the plaintiffs' request as objecting to a
15 clawback effort by Google of a document which plaintiffs would
16 like to submit *in camera* for my review. And the -- and
17 Google's complaint is not just limited to that document, but is
18 how the plaintiffs had responded to privileged documents
19 overall. I think I'm understanding that correctly, and I'm
20 going to give the parties next steps.

21 But my question, my very specific question is: Have I --
22 have I overlooked something? Is there something else at issue
23 here that I haven't identified?

24 And it's -- I'll start at P-19. So, Ms. Bonn, your camera
25 is on. I assume you have the mic.

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1 MS. BONN: Thank you, Your Honor.

2 I think you're certainly correct as to the clawback
3 document. I do think that from the plaintiffs' perspective,
4 what we're asking for is also broader, and here's the way in
5 which it's broader.

6 What we are seeing is that Google is withholding and
7 redacting categories of documents that appear simply not to be
8 privileged. They are technical documents that involve only
9 engineers and no lawyers, and they are documents in which a
10 lawyer may simply be one of dozens of cc's on an e-mail chain
11 that clearly appears to be a business discussion.

12 And we've tried to raise those issues with Google via
13 letters, one in early August and another in early September.
14 These letters were about documents that had been withheld or
15 redacted prior to June. And we're simply not getting
16 responses. We're not getting a meaningful engagement from
17 Google in re-reviewing these documents that appear not to be
18 privileged.

19 And now we're expecting a large production by October 6th,
20 and if we're dealing with a similar time frame, we're simply
21 not going to be able to resolve privilege disputes by the end
22 of the discovery period.

23 So I think what we're really asking for is some guidance
24 from the Court on a process that we can use to efficiently,
25 number one, from plaintiffs' perspective, identify to Google

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1 the log entries and the redactions that appear to be -- that
2 appear to us not to be privileged, and to have a meaningful
3 process to have those issues addressed.

4 I've seen in other cases, you know, before this Court,
5 sometimes that's handled via a Special Master, you know,
6 engaging with the process. Other times I have seen magistrate
7 judges give high-level guidance on their view of what is and is
8 not appropriate to redact or withhold on privilege grounds in
9 some of these categories, and directing the withholding party
10 to re-review with that in mind.

11 So I think, in part, what we're asking for from Your Honor
12 is some guidance on how we can meaningfully work our way
13 through what plaintiffs believe are improper privilege
14 assertions such that we can make sure we're taking depositions
15 once with the documents that are non-privileged and that we
16 should have.

17 **THE COURT:** Okay. Thank you, Ms. Bonn.

18 Ms. Trebicka, it looks like you have the -- you have the
19 mic for Google on this.

20 **MS. TREBICKA:** Yes, Your Honor. So these issues are
21 indeed -- so plaintiffs' issue and Google's issue are indeed
22 related, and they go to the heart of an issue that has
23 tremendous importance to us, and it's causing real prejudice on
24 two levels.

25 **THE COURT:** Okay. So let me just interject there because

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1 I did --

2 MS. TREBICKA: Sure.

3 THE COURT: -- read Google's summary and its concerns on
4 how privileged documents are being handled, and I'll speak to
5 that.

6 Answer a couple of questions for me first.

7 MS. TREBICKA: Sure.

8 THE COURT: And then I will hear from you.

9 With regards to the clawback document, the specific
10 document for which *in camera* review has been requested, I know
11 that obviously Google opposes that. And I think that's tied
12 into your view on how plaintiffs have handled privileged
13 documents. Is that correct?

14 MS. TREBICKA: Correct, Your Honor. We oppose it.

15 THE COURT: Okay.

16 MS. TREBICKA: That's to plaintiffs' issue.

17 THE COURT: That's right. That's right.

18 MS. TREBICKA: Okay. Yes.

19 THE COURT: And then, with regards to the timing, if I
20 understood, again, the summary, Google received a second
21 meet-and-confer letter on privilege log issues September 11.
22 So has Google responded to that -- has there been meet and
23 confer, as in discussion with the plaintiffs, since receipt of
24 that letter?

25 MS. TREBICKA: There have been meet-and-confer

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1 discussions. We have not formally responded yet. We are in
2 the process of reviewing the letter, which -- and I know
3 Your Honor doesn't have the benefit of the letter.

4 **THE COURT:** That's all right.

5 **MS. TREBICKA:** But it challenges dozens of privilege log
6 entries, if not more than a hundred. So we are in the process
7 of reviewing it.

8 And the concern, of course, is that the basis for these
9 improper challenges, in our view, is the review of plaintiffs'
10 counsel of our redacted information. So it's sort of a
11 chicken-and-egg problem. The reason that this letter came
12 forth is because now plaintiff -- because plaintiffs has been
13 basing these challenges on their improper review of our
14 redacted information, information we claim is privileged.

15 **THE COURT:** Okay. And I -- I -- I did see Google's
16 argument in that regard. Here's how I'm going to proceed.

17 One, I will remind both parties of the obligations under
18 the Federal Rules of Civil Procedure, specifically 26(b)(5)(B);
19 and I expect all team members on both sides to be very familiar
20 with that provision, which is -- guides the parties'
21 obligations under the federal rules on how to respond to
22 receipt of privileged material inadvertently produced in a
23 production.

24 And in this case, as I said previously, I set a hard
25 deadline. Google has a lot of documents to be produced. I

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1 would be surprised if there were not inadvertent productions or
2 even -- perhaps an appropriate word is "inconsistent"
3 productions, where a document or an e-mail is redacted but it
4 has also been produced in unredacted form.

5 And so the rules of civil procedure do address this, which
6 is, when a party becomes aware of, either that they produced it
7 or, in this case, that they have received a document that is
8 not consistently -- let's take the situation as it's been --
9 perhaps arose in this case -- not consistently redacted, there
10 is an obligation to treat that as privileged and to lock it
11 down, not distribute it further, inform the other side
12 immediately.

13 And "Then what?" of course, is the question. And
14 especially in a case of inconsistent productions, it's not
15 realistic to think that the redactions have not been read or
16 considered. You know, maybe the unredacted version was -- was
17 encountered first.

18 It's also -- when something is redacted, does a party
19 search for it to see if it's redacted everywhere? That is not
20 inappropriate by itself, simply because if it's -- if it's not
21 redacted in other internal e-mails, then that could very well
22 be a situation of inconsistent or inadvertent production. But
23 if that same material is -- appears in a publication or a
24 public document or something that was broadcast certainly
25 outside the company, then that would, of course, call into

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1 question privilege.

2 And that's why I expect the parties to address this in a
3 good faith and professional manner. And that is, it is not
4 inappropriate for a party to say: Okay, we have two versions
5 of this. One is redacted and one is not. And it does not
6 appear from the unredacted version to be a privileged
7 discussion.

8 Starting that is not inappropriate. Starting that --
9 you know, raising that in meet and confer is not inappropriate.
10 However, that must be -- before that, must -- the party
11 receiving it must treat the document as privileged; that is,
12 not distribute it further, lock it down, flag it, all versions
13 of it that they have found, and set those aside until they have
14 met and conferred with counsel on it; and, if necessary, put it
15 in a pile of, you know, "Is disputed."

16 So I expect the parties to -- to know how to proceed on
17 this and to proceed accordingly. And I do not want to hear any
18 more instances of a document not being properly locked down or
19 being distributed.

20 Similarly, it's -- it is not a breach of ethical
21 violations to raise a -- in the context of meet and confer, to
22 raise the status of a document, particularly where, you know,
23 it's been perhaps not consistently treated. As long as the
24 receiving party has essentially locked it down, they can
25 certainly raise it with opposing counsel. All right?

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1 So I think that should be clear, and I think both sides
2 need to clean up how they proceed in this regard. All right?
3 So, again, that's FRCP 26(b)(5)(B). And everyone on the teams
4 who are reviewing documents or receiving documents needs to be
5 familiar with it, and that will be -- will be enforced. Clear?
6 Good.

7 Okay. The parties need to address privilege log issues.
8 They need to do that in a timely fashion. I did see some back
9 and forth on dates. Again, Google will need time. The
10 production will be completed on October 6. Notwithstanding
11 that I did not get back to Mr. Schapiro's two-sentence speech,
12 but that production will happen, and there will need to be some
13 time to then do that privilege log. There obviously have been
14 preceding privilege logs. I'm going to step back and give some
15 careful thought to that timing, but it's not going to be out in
16 the back half of November. So privilege logs will get
17 produced, and the parties will address and respond to those
18 properly.

19 It is not going to be a solution -- not going to be a
20 solution -- to submit hundreds of documents, either to
21 the Court or the Special Master, for *in camera* review.

22 If you come down to a dispute over, you know, a broad
23 category, then we'll do it by sample. We'll do it by sampling.
24 But the work that Special Master Brush and his team have in
25 front of them, the work that this -- you know, that the Court

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1 engages on on this case, that simply is not going to be
2 feasible. So I just want you to know where -- you know, where
3 we're headed. And I will set some deadlines.

4 I do expect the parties to meet and confer and for Google
5 to respond to the latest letter, and that'll need to happen
6 here in the near term. You're coming up on 30 days that
7 you've -- that you've had that letter. Obviously, there's been
8 a lot of other stuff going on.

9 With regards to the clawback document, I will -- you can
10 submit the document *in camera*, and I'll take two pages from
11 each side as to privilege or not privilege. I'll take a joint
12 submission, two pages each, as to -- on the privilege status of
13 that document. And you can submit it, get that to me by the
14 8th, noon on the 8th of October. All right?

15 I haven't set definitive deadlines. But I think that
16 addresses the issues, and I'll fill in the dates. I need to
17 step back and look carefully at my calendar.

18 Ms. Bonn?

19 **MS. BONN:** Thank you, Your Honor.

20 The only clarification I was going to say is I think that
21 the sampling approach Your Honor mentioned makes a lot of
22 sense. And however much I hope that will be avoided, I think
23 that there's a realistic possibility that it won't
24 (inaudible) --

25 **THE COURT:** I don't want to hear that, Ms. Bonn.

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1 MS. BONN: -- (inaudible) in dispute.

2 THE COURT: I do not want to hear that. All right? That
3 is a last resort. A --

4 MS. BONN: Understood.

5 THE COURT: -- last resort.

6 All right? Because as every litigator on this call knows,
7 document production does take an element of good faith and
8 trust. And we have very good lawyers and highly ethical
9 lawyers on both sides on this case, and I expect that privilege
10 will not be asserted not in good faith.

11 I understand that there are some, a few very narrow gray
12 areas, very narrow. But matters of attorney-client privilege,
13 matters of attorney work product are privileged. That being
14 said, the fact that a lawyer is cc'd in a long string does not
15 make a business discussion privileged. I know everyone knows
16 the guidelines, and I expect those to be followed.

17 So that is not a place to head. I just want to be very
18 clear. I want compromise on both sides. And I'm going to hear
19 argument before I start even considering any *in camera* review.
20 And frankly, the parties really don't have time for it.

21 Ms. Trebicka, follow (inaudible) --

22 MS. TREBICKA: We hear you, Your Honor, and we agree.

23 THE COURT: All right. But I'll do it if -- and I'm
24 not -- I will be very, very concerned if I take a look at
25 documents and -- and they're not privileged. All right?

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1 All right. Okay. I think that addresses the privilege
2 issue. I owe you some dates.

3 Okay. So that's P-19, D-7. That's the discovery orders.

4 And we have -- I'm going to come back to P-12 with the
5 wealth of RFPs in dispute in the Brown case.

6 Let's go to D-9, the requests for admission.

7 Let me just find my notes on that one.

8 And this is RFAs 30, 32, and 34. And you did send me the
9 actual RFAs. Thank you. And this is the dispute about why
10 these are RFAs in this case. And, there they are.

11 Who has the mic? Is that you, Ms. -- Mr. McGee? Who has
12 the mic for -- I apologize -- for -- for Google?

13 **MS. FANI:** I do, Your Honor.

14 **THE COURT:** Ms. Fani. Thank you. Very briefly, Ms. Fani.
15 I did read the submissions. I read the RFAs.

16 Why are these helpful in this case?

17 **MS. FANI:** So I have several reasons, Your Honor, but I'll
18 be brief.

19 So the Brown plaintiffs have alleged in their complaint
20 that the collection of data at issue in this case in modes
21 other than Incognito is common knowledge. And these requests
22 for admission are designed to test that allegation, among other
23 things.

24 **THE COURT:** Say that -- say that again, Ms. Fani.

25 **MS. FANI:** So they have alleged that the collection of

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1 data, the data at issue in this case, is common knowledge for
2 users who are using Chrome outside of Incognito mode; so in
3 basic mode or in sync mode.

4 **THE COURT:** Okay. Okay. Go ahead. I just wanted to be
5 sure.

6 **MS. FANI:** So -- yeah, that's one of the main reasons.

7 And then, of course, this is -- this is relevant to the
8 case because it's impor- -- we would like to know -- so --
9 apologies.

10 **THE COURT:** I took you off script. Sorry.

11 **MS. FANI:** No. So this would help us understand,
12 Your Honor. If plaintiffs understood that Google was receiving
13 this data in all Chrome modes, then it would help us get closer
14 to showing that our disclosures regarding Incognito mode did
15 not suggest otherwise. And so it would give us just a more
16 fulsome picture of plaintiffs' understanding of our disclosures
17 in the Chrome Privacy Notice.

18 **THE COURT:** Okay. All right. That was kind of what I
19 took away from the summary, and that's -- that's helpful.
20 Thank you, Ms. Fani.

21 And, Mr. McGee, why not?

22 **MR. MCGEE:** Judge, first of all, I heard Ms. Fani mention
23 sync; and as we put in our submission, the term "sync" does not
24 appear in our complaint.

25 You can look -- and I'm -- I think it was helpful that

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1 Google -- that you called for it and that Google submitted the
2 RFAs fully. Frankly, when we received these, we thought that
3 they were served to the wrong party. I had to review them
4 probably two or three times to make sure that they were
5 actually served in Brown and meant to be served in Brown.

6 But it's a clear attempt to conduct absent class member
7 discovery, Judge. Whether our plaintiffs have any
8 understanding of sync is not alleged in our complaint. It's
9 not been the focus of any discovery. And importantly, these
10 RFAs -- and I would have to check the date, but I believe they
11 were served before you ordered cross use in this case.

12 So, you know, this is an attempt by Google to get
13 responses by the plaintiffs in Brown to use them in the
14 discovery in Calhoun, to inquire (inaudible) --

15 **THE COURT:** How can they use it in Calhoun, Mr. McGee?

16 **MR. MCGEE:** In their letter, they actually intimate that
17 they will because there's cross use and there's cross
18 production of the discovery responses.

19 We did not specifically include that, and I'm not sure
20 whether Google will be disputing that. But whether our
21 plaintiffs knew about sync or whether they have any
22 understanding of any functions outside of Incognito is not
23 really at issue in this case.

24 If the plaintiffs -- you know, in the complaint, there may
25 be a general statement that Google's collection in

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1 non-Incognito modes may be a little more understood by the
2 public. But, you know, Google has severely attempted to limit
3 the discovery in this case to Incognito.

4 We have other disputes that I won't get into with logged
5 in and logged out that are before Your Honor. Yet now they
6 want to expand the scope of the discovery in this case to
7 include modes that have no issue with our litigation.

8 **THE COURT:** How would -- Ms. Fani, how would Google use
9 these in this case? Give me an example of how you see an
10 admission or a denial utilized in this case.

11 And you're on mute.

12 **MS. FANI:** Yes, Your Honor.

13 So, to the contrary, these -- these RFAs are meant to
14 narrow the issues in the case. We would like to know what the
15 baseline understanding plaintiffs have of each Chrome mode,
16 which are all in one Chrome Privacy -- the Chrome Privacy
17 Policy, which was at issue here.

18 So, for example, if plaintiffs understood Google --
19 Google's disclosures explained that Google receives data while
20 users are in basic mode, the question in the lawsuit becomes:
21 Why did they have a thought that Incognito was any different?

22 So that's why we believe that these requests for admission
23 are specifically relevant to the Brown matter, independent of
24 whether they are relevant in Calhoun or not.

25 **THE COURT:** All right. Thank you. I'll consider that

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1 further. The input of counsel is helpful. Thank you.

2 **MS. WEAVER:** Your Honor, may Calhoun be heard on this
3 issue?

4 **THE COURT:** No. Calhoun has their own issue. Thank you,
5 Ms. Weaver.

6 **MS. WEAVER:** Okay. Okay.

7 **THE COURT:** This is a dispute directed to the Brown
8 defendants -- excuse me -- plaintiffs.

9 Okay. With regards to the specific -- Brown's
10 Dispute P-12, which I acknowledge matches the format I asked it
11 for, P-12 and then its parade of RFPs in dispute, I have just a
12 couple of questions.

13 I have given these some careful consideration, and as I
14 say, there's just a few where I would appreciate hearing from
15 counsel on my specific questions, and then I'll issue a ruling
16 on these shortly.

17 So for plaintiffs, who's got the -- who have we got? Oh,
18 Mr. Richardson, there you are.

19 **MR. RICHARDSON:** Yes, Your Honor.

20 **THE COURT:** Thank you.

21 And, Ms. Jenkins. Okay. Welcome back.

22 Let's turn to RFP 50 -- RFP 50, which is the documents
23 sufficient to identify all websites and publishers that use
24 Google Analytics.

25 And, you know, again, looking at the class definition

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1 of -- the class definition for the Class 1, the Android device
2 users who access a website in private browsing mode, who access
3 a website containing Google Analytics or Ad Manager and who are
4 in private browsing mode and are not logged into their account,
5 it's a -- it's a large ask. I'm trying to figure out how that
6 really helps the plaintiffs or what -- what it leads to in that
7 regard.

8 Mr. Richardson, I'll start with you, briefly. I have read
9 the submissions.

10 **MR. RICHARDSON:** Thank you, Your Honor.

11 And I hope -- I know this didn't come across in the
12 submission, but Ms. Jenkins and I have had many conversations
13 regarding these RFPs and tried very hard to narrow the
14 disputes.

15 This is one where we were unable to resolve our dispute,
16 and I think --

17 **THE COURT:** And I take it this -- I mean, I see 50, 57,
18 and -- what is it? -- 65 are all sort of the same.

19 **MR. RICHARDSON:** Correct.

20 **THE COURT:** Okay. Good.

21 **MR. RICHARDSON:** Okay?

22 **THE COURT:** All right.

23 **MR. RICHARDSON:** And I think that all three of those go to
24 the enormity of Google's collection during the class period and
25 the -- the inability of class members to avoid Google's

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1 collection of their information while they are browsing
2 privately.

3 So there's no dispute that when a class member goes to a
4 website that has Google Analytics, that Google is collecting
5 information from their private browsing. And so by seeking the
6 specific identification of those websites that use Google
7 Analytics, we're seeking to understand the scope of the
8 collection during the class period, which is relevant to
9 liability; we're seeking to understand that for purposes of
10 damages; and we're also seeking to understand that for purposes
11 of Google's consent defense.

12 Google has asserted that publishers somehow consent to
13 this practice. Judge Koh, you know, rejected their argument on
14 the motion to dismiss, but that's still at play here.

15 So we are trying to understand the full scope of
16 collection during the class period by identifying the specific
17 websites and publishers that used Google Analytics.

18 **THE COURT:** Okay. So you're going to get a list of
19 millions of, you know, domain names and other publisher
20 identifiers. How is that helpful to the -- to the plaintiffs?

21 **MR. RICHARDSON:** Well, I think that the specific -- the
22 specifics, in terms of the number, is relevant, again, in terms
23 of liability. It may also prove useful in terms of identifying
24 class members who can say: Oh, yes, I went to those websites;
25 so Google would have collected my data.

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1 And it may -- it may inform what we're trying to do with
2 Special Master Brush in terms of, if Google didn't preserve the
3 data specifically that it collected, it may be possible to say:
4 Okay, well, this is a website where, if a class member visited
5 the website, Google would have collected their private browsing
6 information because it had Google Analytics.

7 **THE COURT:** All right. All right.

8 Ms. Jenkins?

9 **MS. JENKINS:** Yes, Your Honor.

10 **THE COURT:** Why not -- why not push a button and turn over
11 a list?

12 And I do take Google's point that some -- take some
13 websites -- website owners, for want of a better word, they may
14 have signed up for Google Analytics, you know, for some period
15 of time, not some other period of time. But, I mean, Google
16 has the information. It's -- it's millions of names. Why not
17 push the button, generate the list, and turn it over for just
18 the reasons that Mr. Richardson has identified?

19 **MS. JENKINS:** Yes, Your Honor.

20 It is -- it would -- it is a number of tens of millions of
21 websites that would be included by this. And there are a
22 couple of points.

23 One is that it is -- it is not just as easy as pushing a
24 button and coming up with a customer list, particularly in the
25 way that the plaintiffs have asked for the information, which

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1 is, they would like to have the periods in which websites used
2 the Google Analytics or Google Ad Manager during the class
3 period, as well as periods in which they did not, which for
4 tens of millions of websites, compiling something like that, it
5 would take so many hours to try to figure that out that I think
6 we would still be here months from now trying to do that.

7 In addition, for Google Analytics, the plaintiffs
8 themselves can go to a website, use developer tools and
9 determine whether that website uses Google Analytics. They do
10 not need us to come up with this list.

11 And as we said in our briefing, we have already provided
12 this top 25 list for Google Analytics and for Google Ad Manager
13 showing the top 25 websites on a specific date that -- by terms
14 of traffic that use those services.

15 So there doesn't seem -- it is not a request that is
16 proportional to the needs of the case for Google to try to come
17 up with this -- this customer list.

18 On top of that, although we know there's a protective
19 order, the full customer lists of Google is something that is
20 private. It would be considered a trade secret to have these
21 full customer lists. And so there is that concern as well --

22 **THE COURT:** But is --

23 **MS. JENKINS:** -- especially considering the small amount
24 of relevance.

25 Sorry, Your Honor.

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1 **THE COURT:** That's all right. No, no. Ms. Jenkins, to
2 your point that the plaintiffs can find this out by using
3 tools, going to a website, using tools, seeing if that website
4 uses Google Analytics, that's at that moment, right --
5 right? -- that they're currently a user of Google Analytics?

6 **MS. JENKINS:** I believe that's true, Your Honor, yes.

7 **THE COURT:** Okay. All right. Does -- without providing
8 the list, does Google then forego a defense that websites that
9 plaintiffs were using, class members were using did not
10 provide -- or did not use Google Analytics?

11 I mean, they've asked for it.

12 You say: Oh, that's too hard too determine, too hard, too
13 burdensome, not proportional.

14 Then it seems to me that, then, Google is forestalled from
15 using that as a defense when the experts start doing the math
16 about, you know, number of websites, number of users impacted,
17 scope, for damages, et cetera.

18 **MS. JENKINS:** No. Your Honor --

19 **MR. BROOME:** Your Honor, maybe --

20 Sorry, Sara. Go ahead. Sorry.

21 **MS. JENKINS:** It's clear, and Google would recognize, that
22 many websites use these services, especially Google Analytics.

23 If any specific website comes up as being specifically
24 relevant that the plaintiffs want to argue, you know, was using
25 Google Analytics, they can look at the website themselves and

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1 see if it was using it. And so I don't think that we would
2 necessarily be conceding any defenses on that basis.

3 **THE COURT:** Well, but they can -- they only know if it's
4 using it at that moment. They don't know if it was using it,
5 you know, two years ago when they were going to that website
6 every day.

7 **MS. JENKINS:** Yes. But to the extent that Google is able
8 to provide any -- if we were ordered to provide a list of all
9 of the websites, our ability to do that and provide the
10 different time periods for which a --

11 **THE COURT:** I understand.

12 **MS. JENKINS:** -- website --

13 It's -- it's unlikely that we would be able to provide
14 that type of information anyway.

15 **THE COURT:** I understand.

16 **MS. JENKINS:** At least not within the time constraints of
17 this case.

18 **THE COURT:** Thank you. Thank you, Ms. Jenkins.

19 And, Counsel, did you want to be heard? For some reason,
20 you --

21 **MR. BROOME:** Just briefly, Your Honor.

22 **THE COURT:** Wait, wait. Identify yourself for the record.

23 **MR. BROOME:** I'm sorry, Your Honor. Stephen Broome for
24 Google.

25 **THE COURT:** Okay.

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1 **MR. BROOME:** Just briefly on the issue of waiving the
2 defense.

3 I think we need to preserve our ability to make the
4 argument that in order for Google to have collected data from a
5 user who is in private browsing mode, they first would need to
6 visit a website that actually uses Google Analytics, and that
7 may be relevant in the context of class certification and,
8 you know, establishing damages models, et cetera.

9 But I don't -- I don't think the plaintiffs' argument is
10 going to be that -- or I don't think our argument is going to
11 be that none of these plaintiffs ever visited a Google
12 website -- or, sorry -- a website that uses Google Analytics.
13 That's -- that's not something I believe we'd be advancing.

14 **THE COURT:** All right. Special Master Brush, you had
15 turned on your video for a moment, and I'm interested in any
16 questions that you have for either side to shed light on this
17 dispute. But I'm also putting you on the spot, and if you
18 don't have any, that's fine.

19 **SPECIAL MASTER BRUSH:** Not at this time, Your Honor.

20 **THE COURT:** Okay. Thank you.

21 **MR. RICHARDSON:** Your Honor, if I may briefly respond to
22 Mr. Broome's comments.

23 I think that raises exactly what we're concerned about
24 here, is that Google wants to withhold this very basic
25 information that would be relevant to identifying the occasions

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1 where Google is collecting private browsing information; but at
2 the same time, he mentioned damages and that they want to
3 reserve their right to oppose class certification and raise
4 challenges to the analysis of our experts based on the analysis
5 as it ties to specific websites.

6 And so the problem that you identified, Your Honor, is
7 exactly the problem we're facing here, not only in terms of
8 Google's defenses, but Google's plan to both withhold
9 information and then attack our analysis at class certification
10 and at trial, both with respect to liability and damages and
11 their affirmative defenses.

12 **THE COURT:** All right. Thank you.

13 Okay. That's fine. Understood. The parties' positions
14 were pretty well summarized. I know it's always a struggle to
15 deal with a summary, but I do appreciate it, and I do see and
16 appreciate the meet-and-confer efforts.

17 I have a -- just a quick question -- I should know better
18 than saying that -- with regards to RFP 57, which is
19 Google Analytics User-ID, which is: What do plaintiffs think
20 specifically this is?

21 And then I'll hear from -- from Ms. Jenkins.

22 **MR. RICHARDSON:** To the extent you want further details,
23 I'll have to defer to my colleague Mr. Mao. But I will just
24 say that this would be another piece of information simply
25 linked to identifying those websites that use Google Analytics.

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1 I assume that Google also has the record that just identifies
2 whether they use Google Analytics User-ID, which is --

3 **THE COURT:** And is that a different service? Is that what
4 plaintiff -- is that plaintiffs' position, that this is
5 something different?

6 **MR. RICHARDSON:** No. That is a part of Google Analytics.
7 And that's a way in which users are identified. So it's just
8 an identifier linked to Google Analytics. So I would imagine
9 if there's a list of a hundred, some subset of those would use
10 Google Analytics User-ID. It wouldn't be a separate list.

11 **THE COURT:** And why would that additional information --
12 what -- what would that add for plaintiffs?

13 **MR. RICHARDSON:** That is an identifier that's used to
14 identify people. So that's, you know, part of our -- our
15 complaint describes how that's used.

16 **THE COURT:** Okay. And I think the -- what information
17 Google is collecting on the users is an issue very much before
18 Special Master Brush.

19 But, Ms. Jenkins, did you want to speak specifically to
20 RFP 57? Did you have any --

21 **MS. JENKINS:** Well, with respect to RFP 57, as a
22 compromise that we did not propose in the discovery chart, if
23 there were -- for instance, for our list of 25 top websites
24 that we've already provided, we -- we would be able to annotate
25 that to show which of those use Goog- -- use User-ID or have

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1 User-ID. And that, I think, would give them the information
2 that they need with respect to the websites using User-ID.

3 **THE COURT:** All right. That's helpful.

4 Mr. Richardson, have plaintiffs considered the value of a
5 response from Google, going back to where we -- I had them
6 identify the top 25 websites as a point-000-something percent
7 of the tens of millions of websites --

8 **MR. RICHARDSON:** Yes.

9 **THE COURT:** -- to an increase in that number, a helpful
10 increase in that number.

11 **MR. RICHARDSON:** We have, Your Honor. I mean, we've had
12 multiple meet and confers regarding these RFPs. And the truth
13 is that the issues flagged by Mr. Broome, that's exactly what
14 we're focused on.

15 We feel like we can't agree to that sort of compromise
16 because it puts us in a precarious position going forward in
17 terms of having relevant information for purposes of, you know,
18 proceeding with this case and not having Google oppose class
19 certification or our claims at trial based on not providing
20 this information.

21 **THE COURT:** Okay. All right. Question with regards to
22 RFP 64, which is for documents sufficient to show the ways --
23 all ways in which Google uses the data gathered through Google
24 cookies. Has that -- I take Google's position that this has
25 been -- this is a topic that has been covered in the custodial

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1 searches, of which we have all spent a great deal of time.

2 And there's also a reference by Google to a possible
3 stipulation regarding Google's use of data that's been
4 collected. So what -- what's the status of the -- of that
5 stipulation? Ms. Jenkins, has something actually gone across
6 the table to the other side?

7 **MS. JENKINS:** Your Honor, we did provide plaintiffs with a
8 stipulation which did not -- to be perfectly frank, probably
9 did not get to the issues. One of the reasons the plaintiffs
10 rejected that stipulation is they did not think it properly
11 considered this RFP and other -- other -- other requests
12 relating to the use of data.

13 **THE COURT:** Mm-hmm.

14 **MS. JENKINS:** And so we have met and conferred with
15 plaintiffs to attempt to come to some other -- some
16 understanding of how -- what sort of stipulation would be
17 acceptable to them that we could enter into, because we do
18 think that this is very fact specific; and plaintiffs haven't
19 given us a clear indication of what would need to be in the
20 stipulation in order for it to go forward.

21 So while we are still looking into that issue, right now
22 it's unclear whether there is a way forward with a stipulation
23 on that issue.

24 **THE COURT:** Mm-hmm. Mm-hmm. Hard for the plaintiffs to
25 know what to stipulate to when they don't know what they don't

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1 know. That is, they don't know how Google has used the
2 information. Okay. Well, that was really my question in that
3 regard.

4 And, Mr. Richardson, I -- I'm not saying that this is
5 determinative, but this topic has been covered, is addressed
6 through custodial searches. Correct?

7 **MR. RICHARDSON:** That's correct, Your Honor.

8 And I would just add that RFP 64, it's narrow. It's
9 documents sufficient to show. And, you know, I do not think
10 this should be a big burden on Google to identify and produce
11 non-custodial documents responsive to this request. As
12 Ms. Jenkins noted, the stipulation that was provided to us
13 prior to the last hearing didn't address this RFP in any way.

14 **THE COURT:** I understand. I understand.

15 **MR. RICHARDSON:** Okay.

16 **THE COURT:** Okay.

17 **MS. JENKINS:** Your Honor, if I may, as -- the plaintiffs
18 have not identified any gaps in the custodial productions that
19 we've already made. I -- and so we are left -- it's not as
20 though we -- we know the existence of a non-custodial document
21 that just contains all of this information and we are
22 withholding it. That's not what's happening here. It is
23 trying to find the needle in the haystack of some -- of
24 documents sufficient to show what they're asking for here.

25 And we believe, with the broad nature of the search terms

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1 and with the custodians that were selected particularly to have
2 documents about these issues, that that should be sufficient.

3 And to be clear, with our custodial production of
4 documents, we are not just producing e-mail. We are collecting
5 those custodians' other documents, the documents that they --
6 they -- their Google documents, where they keep it on their
7 personal drives, and other chats that result in --

8 **THE COURT:** I understand. I understand the challenges,
9 Ms. Jenkins. I got it.

10 **MS. JENKINS:** Thank you, Your Honor.

11 **THE COURT:** I got it. Thank you.

12 And last, but not least, RFP 166, the -- is a request for
13 dashboard information. And in Google's response, it looks --
14 Google's response is essentially: We're thinking about it.
15 We're looking at it. We're thinking about it.

16 So where -- Mr. Richardson, you can't wait to give me the
17 update; so I'll let you go first. I really want to know where
18 Google is on this, and then we're done for today on this.

19 **MR. RICHARDSON:** Well, Your Honor, I have some good news.
20 We did exchange e-mails this morning, and I think there is some
21 forward movement on producing this information.

22 So I don't actually understand Google to be opposing
23 production of this information. And I would simply say that
24 Google should be ordered to produce so that we don't end up in
25 front of you again, arguing this same point in the future.

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1 Google seems willing to produce this information.

2 THE COURT: Okay. Let's hear -- let's hear it from
3 Google, then.

4 Ms. Jenkins?

5 MS. JENKINS: So, Your Honor, we are not -- we are not
6 opposed to producing this information. And I believe just
7 either earlier today, or it might have been yesterday, we have
8 told them that we will be providing them with screenshots of
9 this information. So -- so to that extent, we are not
10 opposing. I think we --

11 THE COURT: Okay.

12 MS. JENKINS: The nature of the RFP, if it's read very
13 broadly, all internal dashboard information, I don't know that
14 we are in total agreement. We are still discussing with the
15 plaintiffs what they want. And I think after we provide them
16 with this next list of metrics, it will depend on -- if they
17 say that they still need more information, we may have a
18 dispute. I -- I don't know. Hopefully --

19 THE COURT: Okay.

20 MS. JENKINS: -- we will not.

21 THE COURT: Okay. I hope not too.

22 All right. That's all very helpful. Thank you for the
23 attention and preparation. That is all I have on Brown for
24 today.

25 I'm going to take everything under submission. As I say,

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1 I need to sit down with my calendar and my clerks and work out
2 a few dates on the critical issues. All right? So, thank you.

3 **MR. RICHARDSON:** Thank you. Thank you, Your Honor.

4 **THE COURT:** All right. Let's take a five-minute recess,
5 and then we will resume with Calhoun. Thank you.
6 Five minutes.

7 (Recess taken at 10:48 a.m.)

8 (Proceedings resume at 10:56 a.m.)

9 **THE CLERK:** Please come to order. Court is back in
10 session.

11 **THE COURT:** All right. Welcome back.

12 Okay. Calhoun matters. Let's start with status before
13 the Special Master and with Mr. Schapiro's two-sentence update,
14 if that's still relevant.

15 Back to you, Mr. Schapiro.

16 On mute.

17 **MR. SCHAPIRO:** Sorry about that. You didn't miss much.

18 I think it's still relevant. And my colleague,
19 Mr. Ansorge, will probably be speaking about some of the
20 specifics of the issue before the Special Master.

21 But as I noted before, I'm pleased to report that we're
22 going to hit that substantial completion deadline of October 6.
23 I don't think we would have made today. So we thank you for
24 that and we're grateful. But I wanted to give a little context
25 of what that's entailed because I think it might frame, I hope,

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1 thoughts about what -- what comes next.

2 **THE COURT:** Sure.

3 **MR. SCHAPIRO:** In order to meet this, Google hired 300
4 lawyers, 300 contract lawyers, to do the reviewing after your
5 last -- after the last order. I've been in some big cases. I
6 don't think I've ever had one where we've had to hire, on short
7 notice, 300 people to complete a progress -- a project like
8 this. It was a herculean effort that involved a huge amount of
9 time and resources.

10 I'm gratified that Your Honor recognized, or seemed to
11 recognize in one of your comments earlier about privilege, that
12 sometimes when you do that, you know, there are going to be
13 some inevitable mistakes; you have to claw things back; or
14 there might be some later -- you know, some small follow-up
15 productions where we learn, you know, in quality control that
16 there was a call here or there on responsiveness or privilege
17 that was wrong.

18 But we've produced now, totally -- I think this is across
19 both cases. I can break it down, if necessary, but it's
20 roughly even -- around 4 million pages, I'm told; you know,
21 over a million documents, 4 million pages, something like that.

22 And as we go forward, I just hope that we don't lose sight
23 of the proportionality concerns -- I don't think we will. You
24 adverted to that earlier today -- and lose sight of what these
25 two cases are about. They're about, as we view it, at their

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1 core, disputes about what Google represented and how those were
2 understood.

3 We're not really disputing much about our receipt of data
4 here. You can make edge arguments about, well, this might be
5 relevant in one or two ways to damages or ascertainability, but
6 it's not the core. And we, and I think the folks in Brown, at
7 least, want to move quickly to get class cert done, get experts
8 done, get summary judgment done.

9 I just ask that the relative -- the burden and the effort
10 be borne in mind at today's hearing. That's -- that's all I've
11 got, Your Honor.

12 **THE COURT:** That's fine. Thank you, Mr. Schapiro. I do
13 appreciate that. And I am well aware of the efforts and the
14 time on both sides. As I say, Special Master Brush and his
15 team have kept me up to date weekly. You know, I didn't just
16 send you all out there to run up -- run headlong into the wall
17 that is October 6th.

18 And I -- I see progress. I see the challenges that have
19 been identified and met. And we're going to -- we're going to
20 keep going. We're going to keep doing exactly what we're doing
21 and try to -- well, we will; we don't have any choice -- we
22 will keep this moving forward.

23 And I do recognize the effort and the time and the
24 long hours on both sides. Okay. And, as I'm sure you
25 appreciate, by the Court as well.

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1 Okay. So turning to Calhoun, I want to address two issues
2 first because I think they're covered by other issues going on.

3 So let me just start with 2.1, which is raised on the --
4 in the chart. And this is -- was one of plaintiffs'
5 priorities, even though it's a Google dispute.

6 And let me just get my pages in order here.

7 This is -- relates to Google's motion for a protective
8 order against suspending ordinary log retention policies. And
9 I view this as linked to the preservation plan dispute between
10 the parties, which I know you submitted to me some time ago.
11 And I want to be sure, first of all, that I'm understanding
12 that correctly.

13 So from plaintiffs, who's got the mic for plaintiffs on
14 this issue?

15 **MR. STRAITE:** Yes, Your Honor. David Straite for
16 plaintiffs.

17 There will be a moment when we get into the specifics of a
18 couple of these disputes it will be smarter to turn it over to
19 my learned colleague Jay Barnes; but just for the overview
20 where we are, Section 2.1 -- sorry -- Dispute 2.1 was
21 originally a Google dispute.

22 We know the order that Your Honor issued. Not only did
23 you -- did Your Honor issue the protective order, but it was
24 without prejudice to revisiting it --

25 **THE COURT:** Right.

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1 MR. STRAITE: -- as we get more --

2 THE COURT: I know it well --

3 MR. STRAITE: -- information.

4 THE COURT: -- Mr. Straite.

5 MR. STRAITE: Right.

6 THE COURT: I know it well.

7 MR. STRAITE: So during -- during the depositions and
8 other efforts to get discovery into the logs that weren't
9 specifically covered by the order, we were told those questions
10 are out of scope. We've been denied access to any discovery.

11 THE COURT: I -- I understand the dispute. I just want to
12 be sure that this is -- from plaintiffs' perspective, the
13 preservation plan issues and this protective order issue are
14 all -- they're different angles on the same problem.

15 MR. STRAITE: They are. And there's three angles. So
16 it'd be this 2.1, along with the preservation issue, which is
17 1.1, and then now Dispute 1.15. All three of those are linked
18 inextricably.

19 THE COURT: Okay. I'm sorry. You said 2.1 and --

20 MR. STRAITE: 1.1.

21 THE COURT: -- 1.1? Uh-huh.

22 MR. STRAITE: And 1.15, with the most important of those
23 being 1.15. That one --

24 THE COURT: Yeah.

25 MR. STRAITE: -- is going --

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1 **THE COURT:** I'm not --

2 **MR. STRAITE:** (Inaudible).

3 **THE COURT:** Yeah. Okay. All right.

4 On that -- and did -- I just want to be sure the answer to
5 my question is "yes" from the Google side as well.

6 Mr. Ansorge?

7 **MR. ANSORGE:** Yes, Your Honor. We believe that the
8 protective -- I mean, the preservation plan that we had
9 submitted is also related to the scope of the protective order
10 that's in place.

11 **THE COURT:** Okay. All right, then.

12 **MR. ANSORGE:** (Inaudible).

13 **THE COURT:** So the dispute regarding the preservation
14 plan, which is, as Mr. Straite identified, I think, articulated
15 in 1.1, I am referring that to Special Master Brush formally.
16 And he and I have -- have discussed that generally, in that the
17 preservation plan, the protective order, the issue around
18 preservation of logs is something that will be addressed in due
19 course, and that will be addressed by Special Master Brush.

20 And we're going to finish this -- this segment on the
21 production issues -- and I know they're not entirely distinct
22 from the preservation issue but -- the production issues that
23 are currently before Special Master Brush with the four steps
24 and the plan that everyone's working hard through. And
25 production will be under way here shortly in light of our

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1 October 6th deadline. We're going to get through that, and
2 this issue will follow. Okay?

3 **MR. STRAITE:** Thank you.

4 **THE COURT:** Mr. Barnes, did you need to be heard just
5 specifically on the referral of 1.1 and --

6 **MR. BARNES:** Well, it's about -- it's about what you
7 started with, which was, I think, 1.3. You were asking about
8 Special Master Brush. And I -- I had --

9 **THE COURT:** No, I wasn't talking about 1.3.

10 **MR. BARNES:** Okay. I thought that's where -- I'm sorry.
11 Then I misunderstood when -- when we started.

12 **THE COURT:** Okay.

13 **MR. BARNES:** Sorry.

14 **THE COURT:** No, it's not on my list.

15 Oh, I did -- no. I started with 2.1. And if I misspoke,
16 I apologize.

17 Okay. So preservation plan and protective order, 2.1,
18 1.1, those are formally referred to the Special Master.

19 2.13. 2.13, which is a general, as I read it -- and I
20 don't mean this in a pejorative way -- but is a general dispute
21 around plaintiffs' -- number of plaintiffs' discovery requests.

22 I see that as something that will be addressed through the
23 discovery order meet and confer that the parties are going to
24 engage in and get back to me. So that -- I see 2.13 will be
25 covered through the discovery order discussion -- limitation --

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1 discovery limitation order.

2 And, Mr. Straite, from plaintiffs, do you agree?

3 **MR. STRAITE:** Thank you, Your Honor. It makes perfect
4 sense. And we'll make it happen by the -- the noon deadline on
5 October 8th.

6 **THE COURT:** Thank you.

7 And, Ms. Jenkins, for Google?

8 **MS. JENKINS:** Yes. Agreed, Your Honor.

9 **THE COURT:** Okay. Excellent. Thank you.

10 All right. Then let me ask about Dispute 2.16, 2.16,
11 which was identified by Google as a priority, which was
12 plaintiffs' response to Google Interrogatory 15, which related
13 to Google's request for all e-mail addresses of the plaintiffs
14 that they used -- excuse me -- all e-mail addresses for
15 plaintiffs' Google accounts to which plaintiffs had access or
16 used during the class period.

17 It sounded like meet and confer was under way. Dare I
18 hope that this is being handled in a constructive way? Maybe
19 even some good news. It's a Google dispute; so let me hear
20 from Google first.

21 Ms. Fani, welcome back.

22 **MS. FANI:** Thank you, Your Honor.

23 So, you know, the parties have been meeting and conferring
24 on this dispute in advance of this hearing and before the joint
25 submission was submitted. But there is an underlying issue

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1 that I believe we are at impasse on, and that is that,
2 you know, this -- this interrogatory requests all e-mail
3 addresses for the Google accounts that plaintiffs had or had
4 access to during the class period, including shared accounts.

5 And plaintiffs' perspective is that they can just pick
6 select few e-mail addresses or Google accounts that they deem
7 relevant to provide to us, but we do believe that they are all
8 relevant and we -- we'd like the fulsome picture and a list of
9 all of these e-mail addresses.

10 So I do believe that that difference still exists. And we
11 are happy to continue meeting and conferring, of course. I
12 just don't know that we can get past that.

13 **THE COURT:** Why does Google believe it needs all of the
14 e-mail accounts?

15 **MS. FANI:** So, Your Honor, plaintiffs have alleged that
16 Google had a contract with them which has various Google
17 disclosures throughout, and those disclosures change over time.
18 And so we'd like the full list of plaintiffs' Google accounts
19 to help us assist -- or to help us establish what disclosures
20 were seen, when they were seen, by which plaintiffs, and how
21 many -- how many disclosures were seen. So that's directly
22 relevant to our consent defense, Your Honor.

23 **THE COURT:** Okay. Thank you, Ms. Fani.

24 Mr. Straite, why not --

25 **MR. STRAITE:** Your Honor --

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1 **THE COURT:** -- turn over -- wait.

2 Let me just be sure you understand exactly what's on my
3 mind, which is, why not for the plaintiffs -- I mean, we've got
4 a handful of folks -- turn over all the e-mail addresses?

5 **MR. STRAITE:** Thank you, Your Honor. And with your
6 permission, I'd like to turn this over to Ms. Weaver, who is
7 better prepared to address this.

8 **THE COURT:** Oh, thank you. All right.

9 Ms. Weaver, to you, good morning or --

10 **MS. WEAVER:** Good morning.

11 **THE COURT:** Yes.

12 **MS. WEAVER:** Good morning, Your Honor.

13 We're a little mystified here. We have turned over all
14 Gmail accounts for everybody, save one address which they
15 actually have and know. But it is for one plaintiff's work,
16 her business address, and she's a medical provider. And the
17 address actually is [REDACTED] We

18 mistakenly identified it in the complaint. We had meet and
19 confers about it. We told them we were withdrawing that and
20 identifying her personal. It's not within her control. Her
21 business is not a party to this lawsuit, and it's a medical
22 provider. So what she is sending from that work address --

23 **THE COURT:** Okay. So -- okay. I get it. I get it --

24 **MS. WEAVER:** Okay.

25 **THE COURT:** -- as to that one.

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1 Are you saying that for all the other plaintiffs, all of
2 their e-mail accounts -- excuse me -- all of the e-mail
3 addresses for each of their Google accounts has been provided?

4 MS. WEAVER: Yes.

5 THE COURT: Okay. And were -- was defendant aware of that
6 prior to --

7 MS. WEAVER: Yes --

8 THE COURT: -- today?

9 MS. WEAVER: -- we believe so.

10 MS. FANI: No, Your Honor. That's what the interrogatory
11 asks. We ask, you know, please list all of them or say,
12 you know, if you have listed all of them, that we have provided
13 all of them.

14 So our -- from our perspective, plaintiffs had selected a
15 few e-mail addresses that they've provided to us. We're
16 hearing for the first time that all of them but one has been
17 disclosed.

18 THE COURT: Okay. All right.

19 MS. FANI: And just a quick --

20 THE COURT: Let's --

21 MS. FANI: -- point of clarification, just -- just so it's
22 not lost.

23 This isn't just Gmail addresses. We would -- what we're
24 asking is for any e-mail address linked to a Google account,
25 whether plaintiffs' or shared.

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1 **THE COURT:** I understand.

2 Ms. Weaver, that was my question. All e-mail addresses?

3 **MS. WEAVER:** Okay. Well, that is a little confusing to
4 us. I don't know what they mean by "linked to a Google
5 account" actually means.

6 We have provided e-mail addresses for all of the
7 plaintiffs. We don't know how Google might be linking other
8 people's e-mail addresses. So maybe --

9 **THE COURT:** Okay.

10 **MS. WEAVER:** -- now -- yes.

11 **THE COURT:** It sounds like --

12 **MS. WEAVER:** It sounds like we need to confer.

13 **THE COURT:** It sounds like some further meet and confer
14 would be beneficial.

15 So, obviously, if all e-mail addresses -- well, I'll --
16 I'll let the parties have that discussion. But if
17 everything -- you can agree everything's been turned over but
18 the one business account, then I'm going to count this one as
19 resolved.

20 If there's a dispute about which accounts have to be
21 turned over, I expect the parties to figure that out,
22 compromise, and close this issue. It really doesn't seem like
23 you need court intervention.

24 **MR. SCHAPIRO:** Just to save us from having to come back,
25 can I just clarify one thing? Because Ms. Weaver said she

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1 wasn't sure what we meant.

2 So, for example, Patrick Calhoun, whose deposition we
3 took, has a Google account, but he set it up with his Yahoo!
4 e-mail. You can do that. You can set up an -- an account as
5 a -- to use Google products. So, I believe Ms. Kindler did as
6 well.

7 That's what we're asking about broadly when we say: Okay,
8 what e-mails have you used to set up Google accounts?

9 **THE COURT:** Okay.

10 **MR. SCHAPIRO:** We can discuss it further in meet and
11 confers, but I just wanted -- maybe that answers the question
12 quite readily. So --

13 **THE COURT:** Okay. Well, then we won't use court time for
14 the meet-and-confer process. I'll give you a deadline. Let's
15 get this worked out.

16 **MR. BARNES:** Your Honor, if -- if -- if I may?

17 **THE COURT:** I -- not -- I don't think we need any more on
18 this one, Mr. Barnes. I am going to send everyone off to meet
19 and confer and see if they can close it.

20 Let's get to the -- let's get to 1.15, which plaintiffs
21 have identified as most critical to the case. And, first, my
22 first question is: What's the nature of the dispute?
23 Transmissions -- I mean, it's framed as transmissions to
24 Google.com and Google APIs. Sounds like it's a log/database
25 dispute. It's not clear to me that this is the subject of an

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1 RFP. Or did it come up in a depo? Or is it part of the log
2 and database that we may still explore somewhat here today?
3 But what's the nature -- what's the origin of this dispute.

4 And, Mr. Barnes?

5 **MR. BARNES:** In answer to your question, all of the above.
6 So Google --

7 **THE COURT:** Okay.

8 **MR. BARNES:** -- here is attempting to exclude a majority
9 of our case.

10 When I think back to the first hearing we had in front of
11 you, we thought you were impressed by the detail with which we
12 pled the specific transmissions from Chrome to Google. In
13 fact, at one point you said: Well, what else do you need other
14 than these transmissions?

15 In that complaint, there are more examples of
16 transmissions to Google.com than there are to any other Google
17 property combined. Those transmissions to Google.com, that's
18 Google Search.

19 And I can give you specific examples from the complaint,
20 Your Honor.

21 **THE COURT:** No. I'm -- I'm well aware. I --

22 **MR. BARNES:** Right. It's a --

23 **THE COURT:** -- look at the complaint --

24 **MR. BARNES:** -- state government welfare office.

25 **THE COURT:** -- every time I pick this case up.

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1 **MR. BARNES:** A state government welfare office. When a
2 plaintiff was there, the source code caused a transmission to
3 be sent to Google.com. A bank; a state unemployment
4 application; a healthcare provider, where they were seeking
5 an -- an appointment, got sent to Google.com.

6 Google's deponents have admitted that this goes to
7 Search logs.

8 And they say: Oh, well, no, Search logs are not relevant.

9 In fact, the first time we figured this out for certain
10 was in the first 30(b)(6) deposition you ordered. And their
11 deponent said, in regards to, I believe it was -- it's now
12 FAC 165 that that would be associated with Search and a whole
13 other slew of logs. When Ms. Weaver attempted to ask another
14 question, she was cut off and a break was taken.

15 Every time since, we've got some answers from their
16 deponents. And we didn't find out until the last 30(b)(6) that
17 you ordered, they tried to limit it to Display Ads and
18 Analytics.

19 And what Google's doing here, Your Honor, is they're
20 playing games with words. Our complaint distinguishes between
21 Google Ads, which is Google -- which includes Google Search,
22 versus Google DoubleClick, which is Display Ads, and
23 Google Analytics, which is Google Analytics.

24 They're saying: Even though you pled it 19 separate times
25 in the complaint that there are transmissions to Google.com,

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1 that's not relevant to the case.

2 And if I take Your Honor back to April 29th, which is the
3 second hearing we had, we had a discussion -- my co-counsel has
4 told me I'm not allowed to say [REDACTED] but I'm going to say
5 it anyway. Right? We had a discussion about the [REDACTED]
6 cookie. The [REDACTED] cookie goes to Google.com. It's
7 associated with Search. There were questions asked about it.

8 Google counsel answered questions about it in that
9 hearing, even making a joke that it was a delicious German
10 cracker, without ever saying it was outside the scope of this
11 case, because they knew at that time that it was in our
12 complaint.

13 It's that cookie, Your Honor, we believe is included in
14 the complaint more times than any other cookie in the
15 complaint. And now we find out a year later that they're
16 trying to exclude this from the case, and there's no good faith
17 reason to do so.

18 Now, what you might hear from Google is: Well,
19 Your Honor --

20 **THE COURT:** Wait, wait, wait. Wait, wait. Wait, wait.
21 Let me just --

22 **MR. BARNES:** Okay. I'm sorry. I got --

23 **THE COURT:** I got it.

24 **MR. BARNES:** -- worked up.

25 **THE COURT:** I got it.

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1 Let me hear from Ms. Trebicka. I'll be back.

2 MR. BARNES: Thank you.

3 THE COURT: Ms. Trebicka?

4 MS. TREBICKA: Thank you, Your Honor.

5 So we're hearing a lot about this unilateral limitation by
6 Google, but that's just not correct.

7 It's been with plaintiffs' acknowledgment and
8 participation and actual words that discovery has been limited
9 in this case to these two products, which is Display Ads,
10 Google Analytics, and, of course, a third product which is
11 Chrome.

12 And I'll -- since we're dredging up some hearing
13 admissions, at the March 5th hearing, the hearing for our
14 protective order, Mr. Barnes acknowledged himself that the
15 allegations in the complaint did not emanate from a Google
16 property. And Google.com, Google Search is a Google property.
17 And that's in the March 5 hearing at page 40, lines 3 through
18 6.

19 So it's been clear from the very beginning of this case
20 that it -- that it is limited to these two services on
21 third-party websites when plaintiffs, using Chrome in an
22 unsynced mode, are going to visit these third-party websites.

23 And not to belabor the point, but it's been clear in the
24 custodian selection, both by Google as well as by plaintiffs.
25 It's been clear in the search term selections by Google and

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1 plaintiffs. It's been clear in the briefing as well.

2 So, again, going back to the protective order briefing,
3 Google specifically stated -- Docket 108-4 at page 2 -- that
4 plaintiffs allege that Google improperly collected data when
5 plaintiffs used Google's Chrome browser to visit websites that
6 use Google Analytics and Ad Manager services.

7 And plaintiffs took no issue with that in their
8 opposition. On the contrary, their only response to that --
9 this is Docket 117-4 at page 2 -- is that Google ignored sync
10 traffic logs. They agreed that Analytics and Display logs were
11 the proper -- was really the proper scope of the case.

12 And one more -- one more point, Your Honor, which is, this
13 limitation to exclude Google Search, Google.com, or even
14 embedded Google Search in third-party websites makes a lot of
15 sense because of the allegations in their complaint, which are
16 allegations about wiretap and privacy. There cannot be a
17 privacy claim for a user who goes to Google.com and then claims
18 that they understood Google would not be receiving their data
19 if they were browsing in Chrome with- -- without being synced.
20 And frankly, if that was -- if those were the allegations in
21 their complaint, our motion to dismiss would look very
22 differently from what it did and would have likely been
23 granted.

24 I'll stop there, if there's anything in specific you'd
25 like me to discuss in terms of the issues here.

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1 **THE COURT:** All right. Mr. Barnes, I am -- again, I -- we
2 go back -- I do go back to the complaint, and I look at our --
3 this Court's previous orders.

4 I am -- I'm still trying to work my way through the
5 Google.com -- I mean, you type in a search. You start getting,
6 you know, response -- or you start to type; you start getting
7 suggested searches. And I'm not -- it's just not clear.

8 What's the -- what's the value of -- of, you know, the log
9 of my keystrokes when I'm at Google.com?

10 **MR. BARNES:** So, Your Honor, thank you for the question.

11 Ms. Trebicka did not address the actual issue because
12 we're talking about, in the complaint, allegations of
13 transmissions when our plaintiff was at a [REDACTED]
14 [REDACTED] not on Google.com, and not because of the
15 toolbar transmission in the complaint.

16 And, Your Honor, I don't know if I can share things on --

17 **THE COURT:** Well, so why is this a Google.com issue?
18 Isn't that captured because the state welfare website is using
19 some other -- you know, is using Google Analytics or Google
20 Ad Manager?

21 **MR. BARNES:** No. It's not captured in Display Ads or
22 Google Analytics.

23 And this is the fundamental dishonesty Google is
24 propagating on this Court. Their deponent testified that those
25 transmissions alleged in the complaint go to Google Search.

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1 Not when you're on Google.com. When you're at [REDACTED]
2 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], they go
3 to Google Search.

4 Google is confusing the issue for you.

5 **THE COURT:** Because -- because you got there through the
6 Chrome browser? I mean, I'm looking at the class definition.

7 **MR. BARNES:** Because -- yes. Because you're on Chrome and
8 you're unsynced, if you go -- for example, paragraph 165 was
9 [REDACTED] which is a [REDACTED]
10 [REDACTED] website.

11 **THE COURT:** Right.

12 **MR. BARNES:** This sends data to Google.com, the search
13 engine. Google's deponents said it went to Search. Even
14 though you're on [REDACTED] it went to
15 Google Search.

16 **THE COURT:** Okay.

17 **MR. BARNES:** So when Ms. Trebicka just said, "Oh, this
18 case is all about communications that weren't directly on
19 Google.com," we want to take -- we want to -- there's actually
20 an issue with that as well.

21 But at the first instance, there are 18 different
22 paragraphs in the complaint alleging unauthorized disclosures
23 of plaintiff data to Google.com, which is Google Search, when
24 they were not on the Google.com web page.

25 And what Google has done is -- I'm sorry, Your Honor.

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1 They are perpetrating a fraud on this Court.

2 THE COURT: Well, let's --

3 MR. BARNES: Display Ads --

4 THE COURT: Just tell me --

5 MR. BARNES: Display Ads --

6 THE COURT: -- what you need and why you think you need
7 it.

8 MR. BARNES: Display Ads are different than Google Ads.
9 If you -- and we've distinguished --

10 THE COURT: All right.

11 MR. BARNES: -- in the complaint.

12 If you go to 154, we talked about --

13 THE COURT: I do appreciate that difference. I do.

14 MR. BARNES: -- Google Ads, Display Ads, and Analytics.

15 If you go to Google Ads, the home page today, it doesn't
16 say anything about Display Ads, Your Honor. It says search and
17 maps.

18 And so we don't understand what else we -- how many
19 different times we have to allege it in the complaint. There
20 are literally more allegations about transmissions to
21 Google.com in the complaint than there are Display Ads and
22 Analytics transmissions combined. So how can those not be
23 relevant? Their -- and their deponents have admitted. And
24 they came before this Court and said the NID -- talked about
25 the NID cookie without saying it's not relevant to our case.

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1 And while we're at it, I take great issue with
2 Ms. Trebicka's recounting of how we got here. My
3 understanding, Your Honor, is you didn't like the parties going
4 back into this "he said, she said" about how we got here.
5 We -- if you want to hear the history of it, we're happy to
6 give it to you, but I see from that face you don't want to.

7 She mentioned the dispute --

8 **THE COURT:** Okay. I got it.

9 **MR. BARNES:** -- about preservation -- just one more point,
10 Your Honor.

11 She mentioned the dispute about preservation. The dispute
12 about preservation was about logs Google said was too onerous
13 and too short-lived that they shouldn't have to preserve them.

14 Our understanding is that Search logs are kept for a very
15 long period of time. And so that's why it's not -- it's not
16 part of their preservation plan.

17 And finally, go back to, their original response to our
18 motion -- to our RFPs said nothing about this being limited to
19 Display Ads and Analytics. They had a thing in their that
20 said, "We'll give you information about people in Google Ads,"
21 which we understand to mean transmissions to Google.com.

22 At some point I'd also like to address the sideshow about
23 things directly on Google.com and why and how Google made that
24 relevant and --

25 **THE COURT:** Not -- not --

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1 MR. BARNES: Okay.

2 THE COURT: Not at this point, Mr. Barnes. Thank you.
3 All right. Ms. Trebicka?

4 MS. TREBICKA: Yes, Your Honor.

5 THE COURT: Let me just focus that. Okay? Let's just,
6 everybody take a breath here. I don't --

7 MS. TREBICKA: I agree. I'm actually --

8 THE COURT: I've got -- let me just -- okay? I -- we have
9 good lawyers and enthusiastic advocates on both sides.

10 MS. TREBICKA: Okay.

11 THE COURT: Would it be helpful --

12 MS. TREBICKA: I hope that was not directed to me
13 specifically, because I will not address --

14 THE COURT: Ms. Trebicka, Ms. Trebicka.

15 MS. TREBICKA: -- fraud on the Court --

16 THE COURT: What the Court wants from -- there's no fraud
17 by Ms. Trebicka on the Court. Okay? I'll make that very
18 clear.

19 What I want you to address is, I do see the allegations in
20 the complaint and we see these -- we see the allegations tied
21 to visits to websites, data being transmitted, the argument by
22 counsel this is all going to Google Search, and, you know, that
23 this is -- that it meets the -- you know, this is what is --
24 how the class is defined and is in the -- in the pot, if you
25 will, of the transmissions that are -- that are at issue.

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1 And please don't back me up to Google's description of the
2 case as being about disclosures. I take that. It's about
3 disclosures and transmissions.

4 So why aren't these relevant? Or acknowledging they're
5 relevant, why should they not be produced?

6 **MS. TREBICKA:** Well, I think there's two separate issues
7 here. There's the issue of the -- of the scope of the case,
8 and then there's the separate related issue of logs and what
9 kinds of transmissions maybe that could have some relevance but
10 for many, many reasons should not necessarily be searched or
11 produced. Right?

12 So as far as the scope of the case, I think I've addressed
13 it; and I think that --

14 **THE COURT:** Yes, you have.

15 **MS. TREBICKA:** Right.

16 **THE COURT:** Yes.

17 **MS. TREBICKA:** So, and, you know, I will rest on that.

18 As far as the transmissions at issue, to be frank, this is
19 the first time that we have actually understood what it is that
20 plaintiffs are -- claim we have excluded from the case, because
21 there's countless correspondence and there were countless meet
22 and confers on this issue where the allegation was that -- or
23 the charge was that we were excluding improperly from the case
24 products like Google Search, Google.com, actually -- a user
25 actually going to Google.com. Right? So that is something

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1 that we take an issue with.

2 But now we understand that that's not necessarily what
3 plaintiffs are talking about. And we welcome this kind of
4 clarification.

5 As far as the transmissions at issue, the issue is that
6 the way that plaintiffs are -- want to expand the scope of the
7 case now, it would sweep in dozens of Google products that
8 aren't even -- that would be way too burdensome and
9 disproportional to the case to now find a back door to admit
10 into the case. There's more than 80 Google products that are
11 listed in the terms of service.

12 Now that plaintiffs are trying to expand the scope of the
13 case just weeks before class certification, I think we really
14 need to ask ourselves very thoughtfully as to whether this is
15 proportional to the needs of this case where, in discovery, we
16 have now found out that -- you know, I will go back to the
17 disclosures just for a little point, which is, the allegations
18 on this -- in this case are based on Google allegedly
19 misrepresenting something in the Chrome Privacy Notice, and now
20 we are finding out in discovery that none of the plaintiffs we
21 deposed have actually read the Chrome Privacy Notice. We're
22 finding out that none of them (inaudible) --

23 **THE COURT:** I'm going to let you keep the -- let you
24 preserve -- put on ice the disclosure arguments.

25 **MS. TREBICKA:** Okay.

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1 **THE COURT:** (Inaudible).

2 **MS. TREBICKA:** No, that's fine, Your Honor. But we think
3 there's two issues here.

4 First up, that up until now, it was a mass of non-clarity
5 as to what the scope of the case was introduced in about July
6 of this year; whereas for more than -- or about a year, the
7 parties had proceeded to -- with the understanding that the
8 scope of the case was about Google Analytics and Google
9 Ad Manager within the context of Chrome browsing. In July, all
10 of these different allegations arose; and frankly, they took us
11 by surprise because they made no sense in the context of the
12 allegations of the case.

13 And now, for the first time, we're hearing that it is
14 about these specific transmissions to Google Search. Right?
15 Whereas, again, in other correspondence, it's been about all
16 different types of Google products that may receive -- that
17 plaintiffs claim may receive these -- this data when plaintiffs
18 are browsing on Chrome unsynced.

19 So if we can take this narrowing, at least, of what the
20 dispute is -- right? -- I think we've done some progress here.
21 I think perhaps we can try to find some agreement.

22 And, again, it's not -- I don't think it's about the scope
23 of the case. I think it's more of an issue of the
24 transmissions and perhaps what data there may be in certain
25 types of logs.

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1 **THE COURT:** Understood. Okay. Thank you, Ms. Trebicka.
2 Okay.

3 **MR. BARNES:** Your Honor?

4 **THE COURT:** Got it. I'm going to give that some careful
5 consideration. And, again, the parties' summary, I think, did
6 highlight these issues and has been further enhanced by the
7 arguments of counsel here today. So I will give that
8 consideration, and it'll be reflected in my order.

9 All right. Any -- I think that is everything, then, that
10 was on the Calhoun list.

11 Let me call all counsel back. You can turn on your
12 videos. We'll talk briefly about next steps.

13 Let me first, again, call on Special Master Brush. I
14 obviously want to acknowledge, for the record, the
15 Special Master's hard work; hard and consistent. "Diligent"
16 I think would be a good word for Mr. Brush and his team.

17 And, Mr. Brush, do you have any comments or questions that
18 you would like to raise at this time or that you would like to
19 direct to the parties on anything that I haven't covered?

20 Oop. Lost your audio.

21 **SPECIAL MASTER BRUSH:** There we go. I was double-muted.
22 Sorry. Thank you, Your Honor.

23 No. I'd just like to remind the parties, we exchanged
24 some e-mails over the past 24 hours; that my expectation is for
25 you all to continue to kind of work with each other to the best

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1 possible way to resolving some of these open issues.

2 And, again, there's a lot of nuance and details,
3 obviously, with the technology; but stepping back and looking
4 at it from the macro issues of identifying data sources,
5 searching data sources, producing relevant data as part of the
6 discovery process in the next couple -- really, the next week
7 is going to be paramount. So really want to encourage folks to
8 be working together and that parties should be meeting and
9 conferring on this. Certainly do not need my permission. I
10 will resolve issues as they come up and are needed.

11 But I can't stress enough my desire for you folks to work
12 with each other to resolve these things and come to me with
13 fully -- well, at least a little bit more fully thought out,
14 you know, problems as opposed to just: Jeez, we can't get
15 anywhere. I'd like to continue to emphasize that your
16 continued cooperation is appreciated.

17 **THE COURT:** All right. Thank you, Special Master Brush.

18 And obviously, the Special Master's position echoes that
19 of this Court, which is, the parties have an obligation,
20 sleeves rolled up, hard work. You've been doing it on some
21 issues more than others, and -- but it needs to continue.

22 And I know it's exhausting. And I know often you feel
23 like, you know, there's no -- there's nowhere to go from here.
24 And a good way to test that is, you've got to come back with
25 constructive proposals; not just "Here's a mess. Here's a

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1 problem. Figure this out," but a constructive proposal and --
2 and the support for that proposal. So that goes both for
3 issues that come back before me and -- and the issues before
4 the Special Master. So please keep that in mind because, of
5 course, any constructive proposal that comes to either of us
6 has gone to the other side first, and that is something that
7 you all can look at and evaluate.

8 You all have decisions every day to make about picking
9 your battles because there are limited resources, limited time,
10 and, you know, you all have to -- do have to make some choices.
11 So please continue your earnest and good faith efforts in that
12 regard.

13 As far as next steps with this Court, we talked about a
14 couple of deadlines of submissions that you'll get to me by
15 October 8th, and I will endeavor to get you rulings on those
16 the following week.

17 In terms of when do we meet again, I don't know yet, and I
18 have to step back with my clerks and the calendar.

19 I will not be able to get to you -- we will not have three
20 more sessions. I know we've got three months to the end of
21 the year. There will not be another three. I'm not sure we're
22 going to get to another two, and we may -- we may need to make
23 some adjustments to the format.

24 The reality is, of course, post-COVID or waning COVID, one
25 always hopes, floodgates have opened. The courts are full and

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1 fully at it. We have a lot of trials set. We have a lot of
2 motions and a lot of work on the criminal side as well.

3 So I know -- I know you've got tight deadlines, and we're
4 going to get this case -- you know, we're going -- we will keep
5 the discovery managed and moving forward. So, stay tuned.

6 I also appreciate it takes a lot of coordination on your
7 sides, which is why I usually try to give you dates far enough
8 in advance.

9 So I'll give you dates, and if parties need to meet and
10 confer and request a modest adjustment on dates, I'll entertain
11 that; but, you know, it has to be a mutual request. And it may
12 be rejected, not because I don't consider counsel's schedule,
13 but it just may be reflecting limitation of court -- court
14 availability. Okay?

15 All right. Any final questions or comments for the Court?

16 I think we covered the -- certainly, the priority issues.
17 Didn't conclude them, but -- but I think we touched on all of
18 them.

19 From the Brown plaintiffs, anything further for today?
20 Ms. Bonn?

21 **MS. BONN:** No, Your Honor. Thank you.

22 **THE COURT:** All right. And for the Calhoun plaintiffs,
23 anything further for today?

24 **MR. STRAITE:** No, Your Honor. Thank you very much.

25 **THE COURT:** Thank you.

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1 All right. And from Google, anything further for today's
2 proceedings?

3 MR. SCHAPIRO: No. Thank you and the Special Master and
4 Mr. Schmidt for your time.

5 THE COURT: All right. Thank you all very much.
6 Appreciate it. That concludes today's session.

7 Obviously, we did not have a court reporter, Thursday
8 mornings being what they are. But Ms. Fanthorpe has diligently
9 kept us recording on Zoom, and that is our official recording
10 and can be official (audio breaks up) should the parties so
11 desire. All right?

12 Okay. Thank you all very much. That concludes this
13 matter for today, and we are adjourned. Have a good day.

14 (Proceedings adjourned at 11:39 a.m.)

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CERTIFICATE OF TRANSCRIBER

I, ANA DUB, CSR NO. 7445, RDR, RMR, CRR, CCRR, CRG, CCG, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

DATE: Wednesday, October 27, 2021

Ana M. Dub

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG